UNITED MALAYAN BANKING CORPORATION BHD

v.

HASSIM HJ LADIS & ORS

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[ORIGINATING SUMMONS NO: MR5 OF 1990]
3 SEPTEMBER 2001

LAND LAW: *Charge - Order for sale - Application under s. 148 Sarawak Land Code - Conditions precedent - Whether section to be read with other provisions - Principle in s. 256(3) National Land Code - Court to grant order for sale unless 'cause to the contrary' shown - Whether applicable to application under s. 148 - Whether court to grant order unless unjust to do so - Sarawak Land Code (Cap. 81) s. 148(2)(c) - National Land Code 1965 s. 256(3)*

The defendants were the registered proprietors of several pieces of land in Bekenu Town District, Sarawak ('the land'). On 1 November 1982, the defendants entered into an agreement with Fortunland Realty Development Sdn Bhd ('Fortunland') to develop the land ('the project'), and pursuant thereto granted a power of attorney to Fortunland respecting the use of the land. Fortunland thereafter applied for and obtained a loan of RM1.5 million from the plaintiff for the purpose of developing the project. The said loan was secured upon a charge over the land executed by Fortunland on behalf of the defendants.

In June 1985, the plaintiff disbursed parts of the loan to Fortunland. Both Fortunland and the defendants, however, defaulted in the repayment whereupon the plaintiff successfully sued Fortunland for the debt. Having obtained judgment against Fortunland, the plaintiff applied for an order for sale of the land pursuant to s. 148 Sarawak Land Code (Cap. 81) ('the Land Code'). The defendants resisted the application and argued that the application ought to be refused as: (i) having obtained final judgment against Fortunland the plaintiff was barred from proceeding against them; and (ii) Fortunland was not authorised to execute the charge in question. The defendants also argued that Fortunland had expended part of the loan for purposes other than the construction of the project, and that being so, it would be unjust in the circumstances to grant the order for sale.

Held:

[1] Section 148(2)(c) of the Land Code should not be read in isolation but has to be construed with other procedural requirements related thereto. (p 780 g-h)

[2] The principle applicable in an application for an order for sale under s. 256(3) National Land Code 1965, namely, that the court shall order a sale unless it is satisfied of the existence of 'cause to the contrary' should be adopted in an application under s. 148 of the Land Code. Accordingly, in an application under s. 148(2)(c) of the Land Code, the court will make an order for sale unless it is not just in the circumstances to grant the same. (p 781 b-d)

[3] It is settled law that a chargee may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor under s. 148(2) (c) of the Land Code or sue the principal debtor upon the personal covenant contained in any loan agreement entered between the parties. He may also proceed against the surety who guaranteed the loan. And he may pursue all these courses simultaneously, contemporaneously or successively. There is thus no merit in the defendants' contention that the plaintiff, having already obtained judgment against Fortunland, was barred from proceeding against the defendants as owners of the charged land. (p 781 f-g)

[3] Since Fortunland is empowered by the power of attorney to charge the said land to finance its development and the bridging loan was so granted for such purpose, Fortunland was not acting in excess of the power of attorney when executing the said charge. (p 782 g)

[4] On the facts, the plaintiff has fully complied with the requirements of s. 148(1) of the Land Code on the service of the statutory notice. In any case, the issues relating to alleged defective notice of demand were not pleaded by the defendants and nor were the points taken by them at the trial during examination of witnesses. It is trite law that any point or matter which has not been pleaded or in respect of which no evidence had been adduced cannot be raised in submission. (pp 783 b-i & 784 e)

[5] There was no merit in the contention that Fortunland has acted in excess of the power of attorney in using the short term facilities for payment of commission. The evidence showed that Fortunland had already started the project which at the time of release was about 70% completed. The fact that Fortunland was able to complete about 70% of the project before the release of the bridging loan is sufficient proof that it had fully utilised the said short term facilities for the development of the project. However, even if Fortunland has breached the terms, and acted in excess of the power of attorney in expending the short term facilities, there is still no justification to refuse the order of sale in the absence of any evidence to show that the plaintiff is a party to such breach. (p 785 g-h)

[7] The memorandum of charge herein was duly registered. That being so the plaintiff was conferred with indefeasible title to the charge which can only be made defeasible under s. 132(1) of the Land Code on ground of fraud. There was no evidence that the plaintiff has been guilty of fraud or was involved in a dishonest act to cheat the defendants or Fortunland of their existing rights over the land or in the disbursement of the loan. Fraud, in any case, was not pleaded by the defendants. On the facts and in the circumstances, it is just to grant the order for sale under s. 148(2)(c) of the Land Code. (pp 786 i & 787 d-e)

[Application allowed.]

Case(s) referred to:

Arab Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd [2000] 1 CLJ 572 ***(refd)***

Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15 ***(refd)***

Cempaka Finance Bhd v. Abbas Yaakob [1999] 2 MLJ 411 ***(refd)***

China and South Sea Bank v. Tan [1989] 3 All ER 839 ***(refd)***

Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor [1989] 1 CLJ 897 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 ***(foll)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance Sdn Bhd & Ors [1988] 2 MLJ 449 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Muniandy & Anor v. Muhamad Abdul Kader & Ors [1989] 2 CLJ 577; 1989] 1 CLJ (Rep) 116 ***(refd)***

Multi-Purpose Bank Bhd v. Maimoon Abdul Razak [1993] 3 CLJ 21 ***(refd)***

Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 ***(refd)***

Legislation referred to:

Land Code (Cap 81) (Sarawak), s. 148(1), (2)(c)

National Land Code, ss. 132(1), 256(3), 340(2)

For the plaintiff - Lim Lip Sze; M/s Reddi & Co

For the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th - Raymond Lam (Florence Lam); M/s Raymond Lam & Co

For the 8th defendant - Sandra Toh; M/s Yong & Wong

For the 9th, 10th 11th & 12th defendant - KY Lin (Antonio Sim); M/s Kadir, Wong, Lin & Co

Reported by WA Sharif

JUDGMENT

Sulaiman Daud JC:

This is an action by the plaintiff against the 1st to the 7th defendants ("the defendants", which reference does not include the 8th to the 12th defendants) for the sale of lands comprised in lots 55, 56, 57, 58 and 59 all of Bekenu Town District ("the said land") pursuant to s. 148(2) of Sarawak Land Code (Cap 81) to satisfy the principal amount together with interest thereon secured by the charge of the said land. The said land was charged by the defendants to the plaintiff under Memorandum of Charge Instrument No. L. 2593/85 and registered at the Miri Land Registry Office on 6 June 1985 ("the said chage").

This action has a long history. It was initially commenced by way of originating summons which was subsequently converted into a writ action by order of the court dated 15 March 1995. The 8th to the 12th defendants have caveated the said land prior to the said charge and were joined as defendants to this action pursuant to another order of the same date. Danaharta Managers Sdn Bhd was ordered to be made plaintiff to this action by virtue of a vesting certificate which vested all rights, title and interest of the plaintiff to it.

The undisputed facts relevant to the present case are well stated in the written submission of all parties. The defendants are the registered co-proprietor of the said land. On 1 November 1982 they entered into a development agreement with Fortunland Realty Development Sdn Bhd ("Fortunland") to develop the said land ("the project"). Pursuant thereto they granted power of attorney to Fortunland affecting their respective lands. Armed with the development agreement and the power of attorney, Fortunland approached the plaintiff bank for loan to finance the project.

By a letter of offer dated 17 April 1985 the plaintiff offered Fortunland a bridging loan of RM1.5 million and an end financing of RM3 million for the project to be secured by a first legal charge of the said land. The offer was accepted by Fortunland. The defendants then charged the said land in favour of the plaintiff to secure a loan of RM1.5 million ("the loan") granted to Fortunland for the development of the project. The said charge was executed by Fortunland, as their attorney and was registered at Miri Land Registry Office on 6 June 1985 ("the memorandum of charge).

The Plaintiff's Case

It is the plaintiff's case that on 11 June 1985, M/s Wong & Co, advocates, wrote to the plaintiff to recommend partial release of the loan to Fortunland. It was supported by a certificate of completion by Yong Na Choon (Engineering) certifying that 62.4% of the project has been completed. The amount recommended for release was RM917,280 computed as follows:

(a) construction costs of the project ... RM2,100,000

(b) 62.4 % of the construction costs ... RM1,310,400

(c) 70% of 62.4% to be released ... RM917,280

The learned plaintiff's counsel submitted that the sum to be released was in accordance with cl. 4 of the letter of offer which stipulates that 'the bridging loan is to be released progressively at not more than 70% of the work done'. By a letter dated 14 June 1985 the plaintiff informed Fortunland of the release of the said sum of RM917,280. However the defendants have defaulted in making the repayment which caused the bank to take out an application to enforce the statutory charge for an order of sale under s. 148(2)(c) of the Land Code.

The Defendants' Case

The defendants did not dispute the granting of the loan or the terms of the letter of offer. They however alleged that pending the approval and release of the said loan, the plaintiff have granted Fortunland a clean short term credit facility of RM200,000. According to the defendants when the said sum of RM917,280 was released, the plaintiff paid the sum of RM303,000 direct into the account of Fortuneland maintained by the plaintiff. Such amount was then debited from the said account to settle the short term facility earlier granted to Fortunland. They further alleged that they were not given notice on the release of the loan to Fortunland. The defendants also complained that part of the said loan was expended for purposes other than the construction of the project. It was alleged the loan was used for payment of commission/tea moneys to brokers, including the plaintiff manager, and to settle Fortunland own indebtedness to the plaintiff and their other creditors.

Their learned counsel submitted that the order of sale applied for ought to have been refused on various grounds. First the plaintiff is barred from proceeding against the defendants after they have entered final judgment against Fortunland. Second the plaintiff has not satisfied the condition precedent under s. 148 of the Land Code. Third Fortunland is not authorised to execute the charge on the terms contained therein. Fourth Fortunland has acted in excess of its authority under the power of attorney in expending the loan. Fifth the statutory notice to the defendants are defective. Sixth it is not just in the circumstances of the case to grant the order of sale.

Finding Of The Court

The plaintiff's application for the order of sale is made pursuant to s. 148 of the of the Land Code. The said section provides as follows:

> 148. (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing

that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargor shall be at liberty to apply to the High Court:

(a) for an order entitling him to enter possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or (c) for the sale of the charged land, and the Court after hearing the evidence may make such order as in the circumstances seems just.

The learned plaintiff's counsel submitted that in an application under s. 148(2)(c) of the Land Code the only question which this court has to determine is whether it is just in the circumstances of the case to grant an order of sale. He cited the Privy Council case of *Keng Soon Finance Bhd v. MK Retnam Holding Sdn Bhd & Anor* [1989] 1 CLJ 897 which relate to an order of sale under s. 256 of the National Land Code. Subsection (3) of the said section provides that on an application for an order of sale thereunder, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary. In that case Lord Oliver of Aylmerton said at p. 901:

> Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

The learned counsel submitted that the same principle should be adopted in an application under s. 148(2)(c) of the Land Code. The court will have to make an order of sale unless it can be shown that it is not just in the circumstances of the case to grant the same. In my view the said s. 148(2)(c) should not be read in isolation but has to be construed together with other procedural requirements related thereto. In the Federal Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, Gopal Sri Ram JCA stated at p. 51:

> A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by Order 83 Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether

the material produced before him by the chargor constitute cause to the contrary.

In that case it was held that cause to the contrary within s. 256(3) of the Code might be established only in three categories of cases: (i) when the chargor was able to bring his case within any of the exceptions to indefeasibility doctrine in s. 340 of the Code; (ii) when the chargor could demonstrate that the chargee had failed to meet the conditions precedent for making an application for an order of sale; and (iii) when the chargor could demonstrate that the grant of the order for sale would be contrary to some rule of law and equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale.

In my view the same principle should be adopted for an application under s. 148 of the Land Code in determining whether it is just in the circumstances to make an order of sale. However before I proceed to consider the present application under the three headings aforesaid I will firstly deal with the two preliminary issues on the question of law raised by the learned defendants' counsel. Firstly whether the plaintiff is barred from proceeding against the defendants, and secondly whether Fortunland is authorised to execute the charge on the terms contained therein.

Whether The Plaintiff Is Barred From Proceeding Against The Defendants

The learned defendants' counsel argued that the plaintiff has in Suit No. MR 35 of 1989 obtained judgment against Fortunland, the attorney of the plaintiff, as guarantor to the said loan, and is therefore barred from proceedings in this action against the defendants as the owner of the charged land. There is clearly no merit in such argument. It is settled law that a chargee may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor under s. 148(2)(c) of the Land Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively (per Gopal Sri Ram in *Low Lee Lian v. Ban Hin Lee Bank Bhd* at p. 97; see also *China and South Sea Bank v. Tan* [1989] 3 All ER 839 at p. 842).

Whether Fortunland Was Authorised Under The Power Of Attorney To Execute The Charge On The Terms Contained Therein

For the purpose of determining the issue at hand it will be necessary to examine the relevant provisions of the development agreement, the power of attorney and the memorandum of charge. Clause 3(a) of the development agreement provide for the grant of the power of attorney as follows:

3. (a) For the consideration aforesaid, the owner hereby agree to grant an irrevocable power of attorney to the Developer and the same shall

a be binding on their personal representatives and assigns whosoever, which shall empower the Developer, *inter alia*, to charge the said land to any finance corporation or banks to be used solely for the purpose of the development of the said land.

Pursuant to the development agreement the defendants appointed the developer, b Fortunland, to be their attorney to do or perform for them in their names any or all of the acts or things specified thereunder. Clause 4 of the power of attorney which empower Fortunland to charge the said land provides as follows:

c 4. To mortgage, charge, pledge or raise loan with our right title shares and interest in the said land or any part thereof subject to the following terms and conditions:

(a) The said loan shall be used wholly for the development of the said land;

d (b) The said loan shall be released in stages in proportion to the work done on the said land; such work to be certified by a qualified architect; and

(c) Every release of each and every payment of the said loan to the Attorney shall be accompanied by a certified Architect Report which e shall be sent to me/us through the bank/finance company for confirmation.

PW1, who was the manager of the plaintiff branch in Kuching from October 1992 to April 1994 testified that the plaintiff by letter dated 17 April 1985 has approved a loan of RM1.5 million to Fortunland. The said letter (at f p. 58 of B) expressly stated that the loan is to be secured by the said land on which to be erected 21 units of three storey shop houses. Upon perusal of the said letter there is no doubt that such loan was granted for the purpose of development of the project. Since Fortunland is empowered by the power of attorney to charge the said land to finance its development and the bridging g loan was so granted for such purpose, it can be concluded that Fortunland is not acting in excess of the power of attorney in executing the said charge. I will deal with the defendants allegation on the misapplication of the loan money at a later stage of my judgment.

h Having settled those two issues I now turn to consider the present application under the three headings referred to earlier. For convenience I will firstly deal with the matter under second and third heading.

Whether The Chargee Have Met The Condition Precedent For Making The Application For An Order Of Sale

i Section 148(1) of the Land Code requires the chargee, in case of default of payment, to give the chargor a statutory notice in writing that it will resort to all available remedies unless such default be remedied. According to PW1

after the disbursement of the RM917,000 there was payment for the servicing of the interest for few months but was not continued. Subsequent thereto the plaintiff sent reminder followed by statutory notice to each of the seven defendants. The statutory notices were as exhibited at p. 33 to 44 of Bundle B and the acknowledgement of receipt thereof at p. 45 to 50 of B. The statutory notice in respect of the 5th defendant was however made by way of substituted service. In the absence of any evidence to the contrary it is also my finding that the plaintiff has fully complied with the requirement of s. 148(1) of the Land Code on the service of the statutory notice.

That is not the end of the matter. The learned defendants' counsel submitted that the statutory notice sent by the plaintiff to each of the defendant is defective on three grounds. Firstly the said notice has erroneously stated that the charge was executed by the defendants instead of Fortunland; secondly the claim for principal sum and interest were not in accordance with the terms stipulated in the memorandum of charge, and thirdly the plaintiff has varied the interest rate without giving notice of the same to the defendants. The learned counsel cited several authorities where the court have refused the chargees' application for an order of sale of charged land based on the defective statutory demand. I will refer to some of them.

In *Arab Malaysian Bank Bhd v. Lian Yit Engineering Sdn Bhd* [2000] 1 CLJ 572 it was held that the plaintiff by arbitrarily changing the scheme of interest has acted contrary to both law and equity which rendered the Form 16D notice ineffectual and thus invalid. In *Cempaka Finance Bhd v. Abbas Yaakob* [1999] 2 MLJ 411 it was held that the notice of demand which did not comply with the terms of the charge is a faulty notice and thus not enforceable. In *Multi-Purpose Bank Bhd v. Maimoon Abdul Razak* [1993] 3 CLJ 21, the plaintiff has in its statutory notice based its calculation of interest on the factor of "monthly rest" instead of "per annum" as provided under the charge. It was held that the right of the plaintiff to vary the interest rate under the charge did not extend to the right in varying the factor for computing such rate.

In reply the learned plaintiff's counsel submitted that those issues have never been raised or pleaded by the defendants and that the point so raised were also not taken by the defendants or their counsel at the trial during the examination of witnesses. Upon close scrutiny of the joint affidavit of the 2nd and 6th defendants (converted to pleadings) I agree with the learned counsel that such matter or issue were never pleaded therein (see p. 65 to 162 of B). The same were also not pleaded in the affidavit of DW3 affirmed on 29 July 1994 (at p. 179 to 196 of B).

It is trite law that any point or matter which has not been pleaded or in respect of which no evidence has been adduced should not be allowed to be raised in submission. In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667;

([1991] 1 CLJ (Rep) 239) Jemuri Serjan SCJ (as he then was) in delivering the judgment of the Supreme Court stated at pp. 670-671 (pp. 243-244):

> It was demonstrably obvious from the record of the appeal that the first and the third issues which the learned counsel for the appellant canvassed before us were never pleaded at all. A careful scrutiny of the evidence of the appellant himself at the trial shows that evidence was never led and adduced in respect of these two issues .... . This raises the question whether such vital issues effecting the result of the appellant's case need not be pleaded at the outset but could decisively be determined after cross-examination of witnesses for the plaintiff and submission by counsel for the defendant at the trial.

In that case the Supreme Court, following its earlier decision in *Muniandy & Anor v. Muhamad Abdul Kader & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116, *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57, and *Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15, held that where a vital issue was not raised in the pleadings it could not be allowed to be argued.

In the present case there is no doubt that the said issues were neither pleaded nor raised during examination at the trial, and for such reason the defendant cannot raise this point or matter at the submission stage.

I will next consider the third category, that is whether the grant of the order of sale would be contrary to some rule of law or equity. In other words, for the purpose of s. 148(2)(c) of the Land Code, whether in the circumstances it does not seem just to make the order of sale.

Whether The Grant Of The Order Of Sale Would Be Contrary To Rule Of Law Or Equity

The other ground advanced by the learned defendants' counsel which seems to me convenient to be discussed under this category are as follows. Firstly the loan was not used for the development of the project. Secondly the loan was not released in accordance with the terms of the said charge. Thirdly the defendants were not notified of the release of the loan.

On the first ground, the learned defendants' counsel submitted that Fortunland has acted in excess of the authority under the power of attorney as the loan money was not utilised solely for the purpose of the project. In support thereof he relied on the affidavit of DW3 (at p. 179 to 183 of A) which had been mutually agreed between the parties to be accepted as evidence. DW3 averred that between the period 1982-1984, he was introduced to Cheah Kah Soo, Kamarudin and Haji Osman in Kuala Lumpur who represented to him that they could act as brokers for loan to finance his project through their close association with one David Tai on payment of brokerage fee or commission. It was agreed between them that the commission would be RM225,000, being

5% of the total loan of RM4.5 million. He further averred that pursuant to such arrangement the plaintiff granted his company Fortunland an overdraft of RM200,000 ("the short term credit facility"), all of which was used by him to pay the brokers as agreed. According to him the brokerage fee was paid through Cheah Kah Soo by five separate payment amounting to RM215,000. A further sum of RM30,000 was also paid to the plaintiff branch manager in Kuching. He further stated that upon approval of the loan the said sum of RM200,000 was immediately debited by the plaintiff from his account. However during cross-examination he testified that only RM95,000 was paid out as commission while the balance sum of RM105,00 was used for the project.

The plaintiff called PW1 to testify on the said loan. His testimony which is based on the document in his possesion can be summarised as follows. The plaintiff has approved a bridging loan of RM1.5 million to Fortunland for the construction of 21 units of three stories shop houses on the said land. The offer was accepted by Fortuneland and followed by the execution of the charge. The loan was to be released progressively at not more than 70% of the work done. Subsequently Fortunland through its solicitor M/s Wong & Co applied for the release of the loan in the sum of RM917,000, being 70% payment of the work completed. Upon the application, the plaintiff released the sum of RM614,280 to Fortunland through M/s Wong Co. The balance sum of RM303,000 was paid direct to Fortunland account with the plaintiff for cancellation of the short term facilities earlier granted for the project pending approval of the loan. PW1 also tendered exh. P2 which is a credit write up to support the request by Fortunland for additional financing to develop the project where it is stated that the short term facilities had been granted for the working capital of Fortunland to complete the project.

Upon considering the evidence as a whole I find no merit in the contention that Fortunland has acted in excess of the power of attorney in using the short term facilities for payment of commission. It is clear from the testimony of DW3, the director of Fortunland, that before the plaintiff released the bridging loan to Fortunland, the company has already started the project which at the time of release was about 50% to 70% completed. It is to be noted that he had stated in his affidavit that during the period between 1982 to 1984 he was looking for financial backing to finance the project. The fact that Fortunland was able to complete about 70% of the project before the release of the bridging loan itself is sufficient proof that it had fully utilised the said short term facilities for the development of the project. If it is true that the said sum were used for payment of commission what then was the source of its funding to commence with the development of project.

PW1 in his testimony also clarified that it is the practise of the plaintiff bank to grant short term credit facilities pending the release of any bridging loan

to enable the developer to commence with the work. However even if Fortunland has breached the terms, and acted in excess of, the power of attorney in expending the said short term facilities, in my view, there is still no justification to refuse the order of sale in the absence of any evidence to show that the plaintiff is a party to such breach or act.

I now turn to the second issue which relate to the release of the money. The learned defendants' counsel submitted that the plaintiff has breached the terms of the power of attorney granted by the defendants to Fortunland which require the loan to be released in stages in proportion to the work done to be certified by a qualified architect. He argued that in the present case the loan was released on the certificate of one Yong Ma Choon, a civil engineer practising under Yong Ma Choon Engineering Co. He further argued the said certificate was not furnished to the plaintiff by Fortunland but was forwarded by M/s Wong & Co together with the request of the release of the loan money. DW3 also denied knowing Yong Ma Choon. By reason thereof the learned counsel concluded that it is not just in the circumstances for the court to grant the order of sale. The manner of the release of the loan was not disputed by the plaintiff's counsel but he clarified that the letter forwarded by M/s Wong & Co was carbon copied to Fortunland. He further submitted that the fact that Fortunland has accepted the loan released without protest is a clear proof that the application for such release was made with its consent or instruction.

The stage of completion of the project was not denied or disputed by the defendants. In fact it is consistent with the evidence of DW3 who testified that the project was between 50% to 70% completed when the loan was released. The said certificate was forwarded by the defendants' solicitor to the plaintiff for payment. As such I am of the view that the plaintiff has acted in good faith in relying on the said certificate in releasing the loan. It is common knowledge that it is within the competence of a practising consultant engineer to give professional advice and certify the stage of completion of any construction work.

On the contention that the defendants were not notified by Fortunland of the release of the loan, suffice for me to say that no such duty or obligation were imposed on the plaintiff under the said charge. It is clear from the condition of the power of attorney that it is the duty of Fortunland to notify the defendants of the same. Such an allegation even if it is true will not in my view be sufficient ground for the court not to grant the order of sale.

Indefeasibility Of Title

It is not disputed that the said memorandum of charge was duly registered. Upon such registration the plaintiff is conferred with indefeasible title to the charge which can only be made defeasible under s. 132(1) of the Land Code on the ground of fraud. With regard to s. 340 of the National Land Code,

the Federal Court in *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 CLJ 183; [1983] CLJ (Rep) 387 held that the title or interest of a registered proprietor, which include a chargee, shall be indefeasible, such title or interest shall not be indefeasible, by reason under sub-s. (2) of s. 340 of the Code in a case of actual fraud.

It is trite law that fraud must be actual fraud and not constructive fraud. The law is clear that the onus is upon the defendants to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. It must be shown that the plaintiff is guilty of an act involving dishonesty – a wilful and conscious disregard and violation of the right of other persons (see *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors*). Fraud must not only be pleaded but also particularised in the pleadings (see *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance Sdn Bhd & Ors* [1988] 2 MLJ 449.

In the present case it is clear to me that fraud was not even pleaded by the defendants in the defence or averred in the affidavit. There is also no evidence adduced by the defendants to show that the plaintiff is involved in a dishonest act of some sort to cheat the defendants or Fortunland of their existing right over the land or in the disbursement of the loan. There is also no evidence to show that the plaintiff has colluded with Fortunland in a deliberate or dishonest act to deprive the defendants of their right over the said land or the loan secured by the charge. In the circumstances it is also my finding that the defendants have failed to demonstrate that the plaintiff's title to the charge is defeasible upon the ground of fraud under s. 132 of the Land Code to prevent the court from granting the order of sale.

For the foregoing reason I find it just in the circumstances to grant the order of sale under s. 148(2)(c) of the Land Code as prayed. Provided that the execution of such order shall be stayed pending the disposal and determination of the claim of the 8th to the 12th defendants in Civil Suits No MR 51 of 1988 and No. MR 52 of 1988, as the case may be. The award of costs shall be determined upon the final disposal of all the consolidated suits related hereto.